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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. [redacted] 5

THE CITY OF WACO, TEXAS, A MUNICIPAL CORPORATION,

Petitioner,

vs.

UNITED STATES FIDELITY & GUARANTY COMPANY, A CORPORATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

J. WALTER COCKE,
Attorney for Petitioner.

JOHN MCGLASSON,
Of Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 883

THE CITY OF WACO, TEXAS, A MUNICIPAL CORPORATION,

Petitioner,

vs.

UNITED STATES FIDELITY & GUARANTY COMPANY, A CORPORATION, ET AL.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of the City of Waco, Texas, respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

This is a suit originally filed in the Seventy-fourth District Court of McLennan County, Texas, by Curtis Boggs of McLennan County, Texas, against the City of Waco, a municipal corporation of McLennan County, Texas, and J. W. Combs and Wm. P. Glade, each resident citizens of Wichita County, Texas, doing business as Combs & Glade,

for damages in the sum of $51,125.00 for personal injuries alleged to have been sustained on one of the streets of the City of Waco. Plaintiff's cause of action is set forth in his original petition (R. 3). In this petition plaintiff set forth the paving contract entered into between the City of Waco and the other defendants for paving Maple Avenue in said city and alleged negligence on the part of the said Combs & Glade in leaving an embankment at the intersection of said Maple Avenue and North 18th Street, which was alleged to be the proximate cause of plaintiff's injuries. Defendant City of Waco filed a cross action over against the United States Fidelity & Guaranty Company, a corporation under the laws of the State of Maryland, alleging that at the time it entered into a contract with defendants Combs & Glade for paving said Maple Avenue the United States Fidelity & Guaranty Company executed and delivered to the City of Waco its obligations agreeing and binding itself to hold the City of Waco harmless from any claims growing out of or connected with any act of the defendants Combs & Glade (R. 18). Thereafter on the 7th day of July, 1932, transcript of removal was filed in the office of the Clerk of the District Court of the United States for the Western District of Texas (R. 41). During the second term of the United States District Court thereafter plaintiff filed his motion to remand the cause to the State Court (R. 42) praying that the cause be remanded to the State Court and, in the alternative, that the suit of the plaintiff against the defendants Combs & Glade and the City of Waco be remanded to said court, and also, in the alternative, that the suit as against United States Fidelity & Guaranty Company by the City of Waco, as evidenced by the cross-complaint of the City of Waco, be dismissed and the balance of the action be remanded to the State Court (R. 44). The court thereupon on the 23rd day of March, 1933, entered its order overruling the motion to

remand, then dismissed the United States Fidelity & Guaranty Company from the case and remanded the case as to the plaintiff and defendants Combs & Glade and the City of Waco, to which the defendant City of Waco excepted and gave notice of appeal (R. 45).

Appeal from the order dismissing the United States Fidelity & Guaranty Company from the cross-action of the defendant City of Waco was duly perfected by defendant City of Waco to the United States Circuit Court of Appeals for the Fifth Circuit, based upon six specifications of error.

The question involved in appellant's first and second specifications of error was whether or not the cross complaint of the City of Waco against the United States Fidelity & Guaranty Company constituted a misjoinder of parties and causes of action.

The question involved in appellant's third and fourth specifications of error was whether or not a proper and legal plea of misjoinder of causes of action and parties had been filed.

The question involved in appellant's fifth and sixth specifications of error was whether or not pleas of misjoinder had been waived by failure to file same *in limine* at the first term of court after the filing of such cross complaint of defendant City of Waco.

The Honorable United States Circuit Court of Appeals rendered its opinion December 11, 1933, and dismissed the appeal under the erroneous assumption that the trial court had dismissed United States Fidelity & Guaranty Company after said trial court had remanded the cause to the State court (R. 59-62). Thus, the Honorable United States Circuit Court of Appeals inadvertently erred in that it predicated its decision upon a misstatement or misconception of the facts.

The trial court entered one decree in this case but it could have been and had the same effect as if it had been three

separate orders or decrees. That order as entered disposed of the case in the following manner and in the following sequence:

(1) The trial court held that a separable controversy existed, that the case was removable and was properly removed, and *overruled* the motion to remand the entire cause.

(2) The trial court held that the Fidelity Company was an unnecessary and improper party, and then *dismissed* the Fidelity Company.

(3) The trial court then observed after the dismissal of the Fidelity Company that no diversity of citizenship existed in the case as it *then* stood and then remanded the remaining part of the case.

By referring to the order of the trial court (R. 45) it will be observed that the sequence was as above set forth.

A petition for rehearing was filed December 29, 1933, in the United States Circuit Court of Appeals, same being a timely application for rehearing in said court, and the petition for rehearing was denied January 13, 1934 (R. 77).

Petitioner files herewith a certified copy of the transcript of record of this cause, including the proceedings in the said United States Circuit Court of Appeals.

B.

Reasons Relied on for the Allowance of the Writ.

The decision of the United States Circuit Court of Appeals for the Fifth Circuit dismissing petitioner's appeal was erroneous and the action of the trial court in dismissing United States Fidelity & Guaranty Company from the cross-action of your petitioner City of Waco was erroneous for the following reasons relied on by the petitioner for the allowance of the writ of certiorari.

First:

Said decision of the Honorable United States Circuit Court of Appeals dismissing the appeal was based upon an inadvertent error as to the orders of the trial court in this cause and the sequence thereof. The Honorable Circuit Court inadvertently stated that the trial court remanded the case and the cross-action of the City of Waco against the Fidelity Company was dismissed. Upon a reading of the trial court's order (R. 45) it will be apparent that the dismissal of the Fidelity Company took place at a time when the Federal trial court had jurisdiction over the entire cause and before the remand order was made. The Honorable Circuit Court of Appeals properly held that an order dismissing a cause of action is appealable, but said court decided the appeal and dismissed same upon the erroneous understanding of the facts.

If this petition for allowance of writ of certiorari is granted and petitioner's appeal is reinstated the action of the trial court in dismissing the Fidelity Company from the City of Waco's cross-action will be reversed for the following reasons, which are relied upon by the petitioner for the allowance of the writ of certiorari.

Second:

The cross-action of the defendant City of Waco against the United States Fidelity & Guaranty Company was properly joined with the action of plaintiff for his injuries against the contractors, Combs & Glade, and the City of Waco because all matters grew out of the same transaction, relating to the same subject-matter and were dependent in their principal features upon the same evidence and there was no misjoinder of causes of action or parties.

The action of the trial court in dismissing said cross-action is in conflict with the decisions of the local courts in Texas in the following cases, which hold that such cross-action does not constitute misjoinder of causes of action or parties.

National Surety Company v. *Atascosa Ice, Water & Light Company*, 273 S. W. 821, 823-825;

Labor Bank & Trust Company v. *Adams et al.*, 23 S. W. (2d) 814, 815;

Bank v. *Bank*, 77 S. W. 241;

Harris v. *Cain*, 91 S. W. 869;

Kemendo v. *Fruit Co.*, 131 S. W. 73, 76;

Adams v. *National Bank*, 178 S. W. 993, 996.

Third:

There was no proper and legal plea of misjoinder of causes of action or parties filed in this case. The only plea filed being the motion to remand filed by plaintiff, giving as grounds for the motion to remand an alleged misjoinder of the United States Fidelity & Guaranty Company and such motion was not verified, as required by law.

Plaintiff's motion to remand to the State Court clearly was not a plea of misjoinder, the allegations of misjoinder being set out as grounds of his motion to remand the cause.

Furthermore, the motion was not verified by affidavit as required by Revised Civil Statutes of Texas, 1925, Article 2010 reading as follows:

> "An answer setting up any of the following matters, unless the truth of the pleadings appear of record, shall be verified by affidavit:
>
> "(5) That there is a defect of parties, plaintiff or defendant."

Fourth:

Should plaintiff's motion to remand be considered a plea of misjoinder, such misjoinder plea was waived in that such plea or motion was not filed at the first term of court after the defendant City of Waco filed its cross-complaint against the United States Fidelity & Guaranty Company.

The action of the trial court in dismissing the Fidelity Company from the cross-action of the City of Waco was in conflict with decisions of the United States Supreme Court in *St. Louis, etc., R. Co.* v. *Knight*, 122 U. S. 79, 7 Sup. Ct. Rep. 1132, 30 L. Ed. 1077, holding that as to the time to plead in Federal court, the State statutes and practice will be followed and the State statutes as to the verification of pleadings regulate the pleadings in similar cases at law in the Federal court.

Said order of dismissal was in conflict with the local decisions of the State of Texas in the following cases:

Adams v. *First National Bank of Waco et al.*, 178 S. W. 993, 996;

Fall et al. v. *Weber*, 47 S. W. (2d) 365, 366;

Metzger v. *Pacific Mutual Life Insurance Company*, 30 S. W. (2d) 428, 430-431;

Moore-Seaver Grain Co. v. *Blum Milling Co.*, 264 S. W. 551, 552;

Barton v. *Farmers' State Bank et al.*, 276 S. W., 177, 179;

Kemcado v. *Fruit Dispatch Co.*, 131 S. W. 73, 76; (Writ of Error dismissed by Supreme Court);

Garner v. *Jamison et al.*, 162 S. W. 940, 941;

Texas Packing Company v. *St. Louis S. W. Ry. Co.* (Com. of App.), 227 S. W. 1095;

Weekes v. *Sunset Brick & Tile Co.* (Tex. Civ. App.), 56 S. W. 243, 247.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case, numbered and entitled on its docket Number 7045, The City of Waco, Texas, a Municipal Corporation, Appellant, *vs.* United States Fidelity & Guaranty Company, a Corporation, *et al.*, Appellees, and that the said decree and/or judgment of the said United States Circuit Court of Appeals for the Fifth Circuit may be reversed by this Honorable Court and the judgment of the trial court be reversed, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

CITY OF WACO,
By J. WALTER COCKE,
Counsel for Petitioner.

JOHN MCGLASSON,
Of Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933.

No. 883

THE CITY OF WACO, TEXAS, A MUNICIPAL CORPORATION,
Petitioner.

vs.

UNITED STATES FIDELITY & GUARANTY COMPANY, A CORPORATION, ET AL.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The opinion of United States Circuit Court of Appeals for the Fifth Circuit is reported in 67 F. (2d) 785; and is further shown on pages 59 to 62, inclusive, of the transcript of the record.

II.

Jurisdiction.

The judgment of the United States Circuit Court of Appeals for the Fifth Circuit in this cause was rendered on the 11th day of December, 1933 (R. 59 to 62) and the petition for rehearing herein was filed December 29, 1933 and same was denied January 13, 1934 (R. 77).

The United States Circuit Court of Appeals dismissed the appeal without passing upon the specifications of error in appellant's brief.

It is sought to bring this case before this Court on a petition for writ of certiorari as provided for in Section 240 of the Judicial Code of the United States as amended by the Act of February 13, 1925.

It is submitted that this is a case which this Court should supervise by granting a writ of certiorari since the decision of the said Circuit Court of Appeals is contrary to the law of fundamental jurisdiction of an appellate court and the decision of the trial court in dismissing United States Fidelity & Guaranty Company from the cross-action of the City of Waco is contrary to every holding of the Federal and State courts, as set out in petitioner's reasons for the allowance of the writ (pages 4 to 7 herein).

III.

Statement of the Case.

A full and concise statement of the case has been heretofore made in the petition for writ of certiorari under head (A) and, in the interest of brevity, the statement is not repeated at this point.

IV.

Specification of Errors.

First.

The United States Circuit Court of Appeals for the Fifth Circuit erred in dismissing the appeal in that said finding and holding was based upon an inadvertent error as to the orders of the trial court in this cause and the sequence thereof. The Honorable Circuit Court inadvertently stated that the trial court remanded the case and the cross-action

of the City of Waco against the Fidelity Company was dismissed. Upon a reading of the trial court's order (R. 45) it will be apparent that the dismissal of the Fidelity Company took place at a time when the Federal trial court had jurisdiction over the entire cause and before the remand order was made. The Honorable Circuit Court of Appeals properly held that an order dismissing a cause of action is appealable, but said court decided the appeal and dismissed same upon the erroneous understanding of the facts.

Second.

The trial court erred in finding and holding that the cross-action of the defendant City of Waco against United States Fidelity & Guaranty Company was improperly joined with the action of plaintiff for his injuries against the contractors, Combs & Glade, and the City of Waco, for the reason that all matters grew out of the same transaction, relating to the same subject-matter and were dependent in their principal features upon the same evidence and there was no misjoinder of causes of action or parties.

Third.

The trial court erred in finding and holding that the cross-action of the defendant City of Waco against United States Fidelity & Guaranty Company was improperly joined with the action of plaintiff for his injuries against the contractors, Combs & Glade, and the City of Waco, for the reason that there was no proper and legal plea of misjoinder of causes of action or parties filed in this case. The only plea filed being the motion to remand filed by plaintiff, giving as grounds for the motion to remand an alleged misjoinder of the United States Fidelity & Guaranty Company and such motion was not verified, as required by law.

Fourth.

The trial court erred in finding and holding that the cross-action of the defendant City of Waco against United States Fidelity & Guaranty Company was improperly joined with the action of plaintiff for his injuries against the contractors, Combs & Glade, and the City of Waco, for the reason that should plaintiff's motion to remand be considered a plea of misjoinder, such misjoinder plea was waived in that such plea or motion was not filed at the first term of court after the defendant City of Waco filed its cross-complaint against the United States Fidelity & Guaranty Company.

V.

ARGUMENT.

Point 1.

This appellant "by cross-action, as permitted by the Texas practice, vouched in the United States Fidelity & Guaranty Company". (The foregoing words in quotation are quoted from the opinion of the United States Circuit Court in this cause (R. 60). The District Court over this appellant's objection dismissed the Fidelity Company from the action and did so at a time when it had jurisdiction over all parties to the suit and its order of dismissal was a final and appealable order and unless appealed from becomes final under the authority of *Hill* v. *Chicago E. R. Co.*, 140 U. S. 52, 35 L. Ed. 331, 11 Sup. Ct. Rep. 690 and *Floody* v. *Chicago St. P. N. O. Ry. Co.*, 116 N. W. 111. The city's right to retain the Fidelity Company in the case by cross-bill was permitted under the Texas practice and its appeal from the trial court's order dismissing the Fidelity Company should not and is not affected by an order remanding *a part of the case*, which order of remand was made by the

trial court *after* the Fidelity Company had been dismissed and after this appellant had been deprived of its relief by cross-bill.

Appellant does not question the law as set out in the opinion in this cause but earnestly and respectfully insists that the Honorable United States Circuit Court of Appeals inadvertently erred as to the facts. If the trial court had remanded the entire cause and then had sought to dismiss the Fidelity Company or if the Federal court had never properly had jurisdiction, then the effort of the trial court to dismiss would have been void for lack of jurisdiction, but under the facts as they exist in this case the Federal court had taken jurisdiction and overruled a motion to remand and its dismissal of the Fidelity Company was a final and appealable order and instead of presenting to this Court a moot question this appeal involves a question of vital importance to the City of Waco, for the dismissal of the Fidelity Company has deprived this appellant of its right which exists under the Texas practice to have the Fidelity Company in the same suit and to have all of the matters in controversy settled in one trial. Under *Hill* v. *Chicago Ry., supra*, unless the action of the Federal trial court is reversed it becomes *res judicata* in this cause and prevents the Fidelity Company from being vouched in again in the State court.

Point 2.

The record does not disclose a misjoinder of causes of action or parties. In actions at law the Federal courts follow the State practice with respect to the joinder of causes of action.

28 U. S. C. A., Section 724;

Compania Minera Y. Compradora, etc., v. *American Metal Company* (D. C. Tex. 1920), 262 Fed. 183.

In *National Surety Company* v. *Atascosa Ice, Water & Light Company* (Tex. Comm. App.), 273 S. W. 821, 823-825, the court held that in a depositor's action against a bank for deposits wrongfully abstracted and misappropriated by the bank's cashier, the bank was properly permitted by cross-action to implead the surety on the cashier's bond, where under the pleadings and proof the same evidence which authorized recovery by the depositor against the bank likewise authorized recovery by the latter against the surety. This is the latest word which we have been able to find from the court of last resort in our State.

Matters *ex contractu* and *ex delicto* may be joined where they grow out of the same transaction, relate to the same subject-matter and are dependent in their principal features on the same evidence, as they clearly are in the instant case.

Bank v. *Bank*, 77 S. W. 241;
Harris v. *Cain*, 91 S. W. 869;
Kemendo v. *Fruit Co.*, 131 S. W. 73, 76;
Adams v. *National Bank*, 178 S. W. 993, 996.

Applying the rules announced in the *Atascosa* case, *supra*, and other cases hereinabove cited, under the pleadings in the case at bar, the same evidence which would authorize recovery by plaintiff against defendants Combs & Glade and the City of Waco would authorize recovery by the latter against the Surety Company. Under the cases quoted and cited there was no misjoinder.

POINT 3.

Plaintiff's motion to remand to the State court clearly was not a plea of misjoinder, the allegations of misjoinder being set out as grounds of his motion to remand the cause.

Furthermore, the motion was not verified by affidavit as

required by Revised Civil Statutes of Texas, 1925, Article 2010 reading as follows:

> "An answer setting up any of the following matters, unless the truth of the pleadings appear of record, shall be verified by affidavit:
>
> (5) That there is a defect of parties, plaintiff or defendant."

Thus where an insurer appeared before the Industrial Accident Board as insurance carrier, made no objections to amendments to the petition in trial court impleading it as such, and filed no verified pleadings asserting defective parties, it could not raise the point on appeal. *Associated Employers Reciprocal* v. *Brown* (Tex. Civ. App.), 56 S. W. (2d) 483.

POINT 4.

If it should be considered that the plaintiff's motion to remand constituted a proper and legal plea of misjoinder, which is not admitted but denied, such plea was not properly considered for the reason that same was waived by plaintiff's failure to file same until after the beginning of the second term of the United States District Court after the cross-action of the defendant City of Waco had been filed.

As to the time to plead in Federal court, the State statutes and practice will be followed and the State statutes as to the verification of pleadings regulate the pleadings in similar cases at law in the Federal court.

28 U. S. C. A., Section 724;

Phenix Insurance Co. v. *Charleston Bridge Co.*, 65 Fed. 628;

St. Louis, etc., R. Co. v. *Knight*, 122 U. S. 79, Sup. Ct. Rep. 1132, 30 L. Ed. 1077.

In *Adams* v. *First National Bank of Waco et al.* (Tex. Civ. App.), 178 S. W. 993, 996, paragraph 7, the court said:

> "By failing to object to the joinder of the cross-defendants for more than a year after they had been made parties and had appeared and answered, and by agreeing to several continuances in the meantime, we think that the Bank waived its right to object on the score of delay to said defendants being made parties to this suit. * * * If it be conceded that the cross-defendants were proper, though not necessary, parties to the bank's cause of action, sustaining the exception to such joinder must be held to have been an abuse of the court's discretion."

The Commission of Appeals of Texas in *Barton* v. *Farmers' State Bank et al.*, 276 S. W. 177, 179, paragraphs 3-4, held that plaintiff and impleaded cross-defendant in not pressing objections to misjoinder of causes or parties on appearance day, but consenting to continuance to subsequent term, waived misjoinder and the rule forbidding misjoinder of cause or parties, being one of convenience, which should not be permitted to defeat the general policy of avoiding multiplicity of suits should be pleaded *in limine* or at first reasonable opportunity, and, if not seasonably made is waived. The court said:

> "No actual delay was encountered by reason of Barton's 'cross-action' and the impleading of Hutto. The case made by the bank's pleading was first triable at the January term, 1923; and Hutto was vouched in prior to the beginning of that term; he answered on its appearance day, and thereafter remained a party defendant. Both Hutto and the bank had ample opportunity, on January 2nd, and throughout the January term to press any objection of misjoinder of causes or parties."

So in the case at bar *no actual delay was encountered by reason of the City's "cross-action" and the impleading of*

the bonding company. The answer so impleading the bonding company was filed in the State court prior to the appearance day of the term of court to which the City was cited to appear. The United States Fidelity & Guaranty Company answered immediately and filed proper removal papers *and the case was first triable at the November term of* 1932. *The plaintiff had ample opportunity in November,* 1932, *and throughout the November term to press any objection of misjoinder of causes or parties.*

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this Honorable Court of its supervisory powers in order that justice may be done and that the orders and actions of the trial court and United States Circuit Court of Appeals for the Fifth Circuit may be reversed, and that to such an end a writ of certiorari should be granted and this Court should review the decisions of the United States Circuit Court of Appeals for the Fifth Circuit, and finally reverse said decision and that of the trial court.

Respectfully submitted,

J. WALTER COCKE,
Counsel for Petitioner.

JOHN MCGLASSON,
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